Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 197____

NO. 76-1409

REYNALDO VILLARREAL, AKA PANCHO

PETITIONER

VS.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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NO._____

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REYNALDO VILLARREAL, aka Pancho

PETITIONER

VS

UNITED STATES OF AMERICA

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which appears at Appendix A , pages 1 thru 8 , has been reported. A notice dated March 17, 1977, advising counsel for all parties that an order denying Petitioner's Petition for Rehearing en Banc was entered on said date, appears at Appendix B page 1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit (App. A pp. 1 thru 8), was entered on February 9, 1977. A timely Petition for Rehearing en Banc was denied on March 17, 1977. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTIONS PRESENTED

Did the government prove by evidence independent of hearsay statements the existence of a conspiracy and appellant's knowing participation in that conspiracy?

Did the government prove that an overt act was committed in furtherance of the conspiracy?

Should the Court have stricken Overt Acts No. 10 thru 15 of the Indictment and testimony relating to those overt acts?

STATEMENT OF THE CASE

Appellant and co-defendants (Trevino, Arriaga and Acuna) were indicted by the Grand Jury of the United States District Court, Western District of Texas, San Antonio Division. The indictment charged all defendants with conspiracy to distribute heroin.

Trevino pled guilty to the conspiracy count. Acuna's case was severed. On April 5, 1976 appellant and Arriaga pled not guilty and were tried by jury. On April 8, 1976 both appellant and Arriaga were found guilty of conspiracy to distribute heroin.

On April 8, 1976 appellant's bond was revoked and he was remanded to custody. On May 18, 1976 appellant was sentenced to serve fifteen (15) years with a special parole term of twenty (20) years.

STATEMENT OF FACTS

On June 6, 1975 Russell Reina, an agent of the Drug Enforcement Administration, began negotiations with co-defendant Trevino for the purchase and sale of a quantity of heroin. During these negotiations Trevino made reference to his source in Laredo, Texas.

Long distance telephone records show that calls were made from Trevino's telephone to telephone number 722-4788 in Laredo, Texas. These calls were made during the negotiations between Trevino and Agent Reina. The number 722-4788 was issued to Daniel Villarreal who resides at 1504 Market Street in Laredo, Texas. Residing with him were Mrs. Daniel Villarreal, the appellant, and another son.

On June 13, 1975 Trevino drove to Laredo, Texas. He went to the house at 1504 Market St. Later that night Trevino, appellant and two unidentified males drove to the Pizza Hut in Laredo.

Trevino sat at a table with the government agents and co-defendant Arriaga. Arriaga was an employee at the Pizza Hut and was on duty that night. Appellant and the two unidentified males sat at a separate table about twenty-five feet away from Trevino's table.

Negotiations took place between the agents, Trevino, and Arriaga. Arriaga counted money which had been brought by the agents. But Arriaga did not have any heroin. Trevino approached appellant's table and conversed with Appellant. Appellant approached Arriaga and told Arriaga "to tell him what time the man could be ready" or words to that effect. Agent Reina testified that he "didn't know that they were talking about a delivery time." After further discussions between Trevino, Arriaga and the agents, the negotiations were terminated.

Reina later contacted Arriaga to inquire about the heroin. Arriaga repeatedly told him that he still was unable to furnish him any heroin.

On June 14, 1975, Reina and Arriaga met at the Laredo Civic Center where Arriaga informed Reina that he was unable to furnish the heroin. Neither appellant nor Arriaga ever furnished any heroin to Trevino or the government agents.

On August 22, 1975, Trevino purchased a quantity of heroin from Hector Acuna in San Antonio, Texas. Appellant and Arriaga had nothing to do with that transaction. Overt Acts 10 through 15 of the indictment concern the transactions between Trevino and Acuna.

During the trial appellant moved the court to strike Overt Acts 10 through 15 of the indictment. This motion was denied. At the close of the government's case appellant moved the court to strike all testimony relating to Overt Acts 10 through 15 and this motion was denied.

REASON FOR GRANTING WRIT

This case involves a question of exceptional importance: the sufficiency of non-hearsay evidence to establish a conspiracy conviction and a Defendant's Sixth Amendment right to confront the witnesses against him.

ARGUMENT

I. The Court should have granted appellant's motion for judgment of acquittal.

A. The government failed to prove by evidence independent of hearsay statements the existence of a conspiracy and appellant's knowing participation inthat conspiracy.

The government must introduce sufficient independent evidence of the existence of a conspiracy and of the appellant's participation therein before the judge may allow declarations of a co-conspirator to go before the jury. U. S. vs Apollo, 476 F2d 156, 159 (5th Cir. 1973).

The standard in determining the sufficiency of the evidence other than hearsay is: whether the government by evidence independent of the hearsay declaration of a co-conspirator, has established a prima facie case of the existence of a conspiracy and of the appellant's participation therein; that is, whether the other evidence aliunde the hearsay would be sufficient to support a finding by the jury that the appellant was himself a conspirator. U. S. vs Oliva, 497 F2d 130, 132, 133 (5th Cir. 1974).

Mere knowledge, acquiescence or approval without cooperation, or agreement to cooperate, is not enough to constitute one a party to a conspiracy. U. S. vs Mendez, 496 F2d 128, 130 (5th Cir. 1974). In order to fasten guilt on one accused of being a co-conspirator it is necessary to prove that he actively participated in the conspiracy charged. Mendez, supra at 130.

Mere association with the conspiracy is not enough to establish participation in the conspiracy. Mendez, supra at 130.

The government presented six witnesses. The crucial testimony was that of Officers Reina and Alonzo. Virtually the entire testimony of Reina and Alonzo consisted of out-of-court statements made by co-defendants Trevino and Arriaga.

The recorded conversations between Officer Reina and Trevino are hearsay. (See Trial Court's remarks at Record 33, Record 42). Trevino's responses to Officer Reina and Officer Alonzo are hearsay.

The recorded conversations between Officer Reina and Arriaga are hearsay to appellant. Arriaga's statements to Officer Reina and Officer Alonzo are hearsay to appellant. It cannot be over-emphasized that neither Trevino nor Arriaga nor any other co-defendant testified for the government.

Appellant rested his case without presenting any testimony. Arriaga took the stand in his own

behalf. Arriaga's testimony cannot be used against appellant. U. S. vs Arias-Diaz, 497 F2d 165, 168 (5th Cir. 1974) cert. denied at 420 US 1003 (1975).

So, the out-of-court statements by Trevino and Arriaga cannot be used against appellant. A review of the record will show that almost all of Officer Reina's and Officer Alonzo's testimony is based on these statements.

A third government witness was William Jonas, Jr. Jonas was an employee of Southwestern Bell Telephone Co. His testimony related to business records of Southwestern Bell. These records reveal, that phone calls were placed from Trevino's phone to Villarreal's phone. These records are hearsay. They are admissible under the Business Records Exception. As hearsay, however, they cannot be used to establish the conspiracy or appellant's participation in it.

There is no evidence that Trevino even spoke to appellant on the telephone. It is equally possible that someone other than Trevino spoke to one of the other three persons who resided at 1504 Market Street.

Government witness Wendling testified that he kept the defendant's under surveillance. He observed the defendants commit certain acts. The acts committed by appellant's co-defendants would be hearsay as to appellant, i. e. Arriaga's act of counting the money at the Pizza Hut; Arriaga's act of stopping at the King Cole Service Station; Arriaga's act of meeting with Officer Reina.

Rule 801 of the Federal Rules of Evidence reads in part as follows:

"(a) Statement. A 'statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Emphasis added).

The final two witnesses were government agents. They never spoke or met with the Defendant prior to their arrest.

Strip the record of all the hearsay as to appellant that is:

1. The hearsay responses of Arriaga and Trevino which form virtually the entire basis for testimony of Officers Reina and Alonzo.

2. The telephone records from Trevino's phone to appellant's phone.

3. Act committed by co-conspirators.

Once the record is shorn of the hearsay evidence, the independent non-hearsay evidence which remains is:

1. Trevino's presence at appellant's residence;

2. That appellant went with Trevino to the Pizza Hut;

3. The presence of appellant at the Pizza Hut while the negotiations were taking place but at a table about twenty-five feet away from the negotiations;

4. Appellant's statement to Arriaga at the Pizza Hut: "to tell him what time the man could be ready," or words to that effect.

In U. S. vs Oliva, 497 F2d 130 (5th Cir. 1974), the Court was faced with almost the identical factual situation. There, the government showed that several telephone calls were placed between Oliva's and the seller's residences immediately prior to the attempted sale of cocaine, that Oliva was present in the parking lot at the time of the attempted sale, and that Oliva was aware of the seller's interest in selling cocaine. The Court held these facts insufficient to establish a conspiracy.

There is absolutely nothing to show any active participation on appellant's part, nor did the evidence

show concerted action for the accomplishment of a common purpose. There was no evidence that appellant even knew that the negotiations were taking place. Appellant was seated twenty-five feet away from Trevino's table.

There is no showing that appellant ever discussed the sale of heroin, that appellant ever agreed to supply anyone with heroin, or that appellant ever had any heroin in his possession. See Oliva, supra at 134.

The government places heavy reliance on appellant's statement to Arriaga concerning a time. But that statement, taken independent of the hearsay evidence of what was occurring during the negotiations at the Pizza Hut, in no way establishes a conspiracy. Conjecture and suspicion would indicate that appellant was referring to the heroin transaction. But it is equally possible that he was referring to something else; i. e., he was demanding to know when

his food was going to be ready. Even the government agent who had particpated in the entire negotiations did not know what was meant by the appellant's statement to Arriaga. There is no evidence appellant was familiar with the "street meaning " of the term "the man". It is not difficult to see the danger of upholding a conviction on so slight amount of evidence.

The evidence in this case at most shows appellant's association with Trevino and Arriaga and knowledge of their activities. Without the benefit of the hearsay, the evidence is insufficient and the government's conspiracy charge in this case must fall. See U. S. vs Tyler, 520 F2d 1329 (5th Cir. 1975); Mendez, supra.

Boiled down to the essentials, the Courts will now sustain a conviction based on the following testimony:

"We are government agents. We never met with the Defendant. We never spoke to the Defendant. We saw the Defendant meet with other people. We met with these other people. We told these people that we were interested in purchasing heroin. [The responses of these people are excluded as hearsay.]

B. The object of the conspiracy cannot be established without the hearsay evidence. Statements by government witnesses ("I told them that I wanted to purchase heroin") do not establish that Defendant agreed to distribute heroin. The hearsay responses are needed to establish that the appellant agreed to distribute heroin as compared to any other substance. Without the hearsay evidence the object of the conspiracy, if any, is unknown.

C. There is insufficient evidence to establish that appellant was acting in concert with the seller

rather than the buyers. The telephone calls to appellant's residence were placed by Trevino. Trevino stayed at appellant's home. They arrived together at the Pizza Hut. There is nothing in the government's case in chief to indicate that appellant even knew Arriaga. If the statement concerning a time referred to the heroin transaction, it was apparently an attempt to assist Trevino in securing the heroin. Proof under charges of a conspiracy to distribute that onewas acting with the buyer to effect a purchase, is not proof that he was acting with the sellers to effect a sale. Lambert vs U. S, 101 F2d 960 (5th Cir. 1939). Every fact and circumstance in the government's case points to appellant as acting in concert with Trevino to purchase heroin. Not a single one points to him acting in concert with Arriaga. See Lambert, supra at 963.

D. The government failed to prove that an overt act was committed in furtherance of the conspiracy.

Although the gist of a charge of "conspiracy" under the Criminal Code is the agreement to commit an offense against the U. S., an overt act must be done pursuant to the agreement before the crime is complete. Hamner vs U. S., 134 F2d 592 (5th Cir. 1943).

The non-hearsay evidence established that the agreement, if any, occurred at the Pizza Hut. Whether the negotiations which occurred at that meeting constituted an agreement is questionable. Nevertheless, neither Arriaga nor Trevino nor appellant ever committed an overt act in pursuance and furtherance of that conspiracy.

Arriaga was telephoned numerous times by the government agent. Each time Arriaga informed him that Arriaga was unable to furnish narcotics. Even this evidence was hearsay. There is nothing in the government's case to indicate, then, that an overt act was committed in furtherance of the agreement, if any, made at the Pizza Hut.

The Fifth Circuit Court of Appeals stated that certain meetings and telephone calls established the overt acts in furtherance of the conspiracy. Of course, a conspiracy must exist prior to the time overt acts are committed in furtherance of the conspiracy. Once the overt acts are eliminated, there is no evidence establishing the conspiracy. By necessity, the same evidence is being used to establish the conspiracy and the overt acts in furtherance of it.

II. The Court should have stricken Overt Acts 10 through 15 of the indictment and testimony relating to such overt acts.

The legal ground here is relevance. Neither appellant nor Arriaga ever delivered any heroin. The delivery of heroin in San Antonio took place two months after the negotiations in Laredo, Texas had terminated. Appellant and Arriaga had absolutely no involvement in that transaction. The evidence which related to that transaction (the testimony as well as the chemist's report) had no probative

value whatsoever in this case.

Any probative value that did exist was far outweighed by the prejudicial effect such evidence had on the jury. It is fairly obvious that such testimony had the natural and probable effect of confusing the jury with collateral matters. The jury may very well have based appellant's conviction on the erroneous belief that appellant was somehow legally responsible for the San Antonio delivery. See U. S. vs Goodwin, 492 F2d 1141 (5th Cir. 1974).

Appellee stated in the Court below that appellant waived his right to complain by not objecting to the admissibility of the evidence. The problem, however, is that when the evidence was offered, the evidence was relevant to the overt acts of the indictment. Therefore, an objection would have been groundless.

Appellant initially moved the Court to strike Overt Acts 10 through 15 so that any such testimony would not be relevant to the charges against appellant. The Court denied the motion. At that

point the testimony in question was relevant to the indictment. When the evidence was finally concluded, it was then clear that such evidence did not relate to appellant and co-appellant Arriaga. The motion to strike the testimony should then have been granted.

Separate conspiracies can be charged in one indictment. But the evidence in a case must at least relate to the persons being tried. If Trevino or Acuna had also stood trial, then the evidence would have related to their activities. But to allow such evidence to be used in this case served no other purpose than to imply that appellant and Arriaga were somehow responsible for that transaction. The evidence shows that the Laredo negotiations had terminated long before the San Antonio transaction took place.

CONCLUSION

There is insufficient evidence independent of the hearsay statements to establish a conspiracy and appellant's knowing participation in

that conspiracy. For these reasons, appellant contends that this case should be reversed and rendered. Alternatively, the court was in error in allowing testimony relating to Overt Acts 10 through 15 of the indictment. This error was obviously prejudicial and, therefore, the case should be reversed and remanded for new trial.

WHEREFORE, Petitioner prays that the Writ of Certiorari be granted upon hearing and the judgment of the Court of Appeals and Trial Court be reversed and this cause be remanded for new trial.

Respectfully submitted,

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Laredo, Texas 78040
Attorneys for Petitioner

by _____
Jacob G. Hornberger, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 1977, two copies of Petitioner's Petitioner for a Writ of Certiorari were by me mailed to the United States Attorney for the Western District of Texas, 655 E. Durango Blvd., San Antonio, Texas 78205, and three copies were on said date mailed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

_____
Jacob G. Hornberger, Jr.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

VS

REYNALDO VILLARREAL, aka Pancho
and Joe Arriaga,

DEFENDANTS-APPELLANTS

NO. 76-2623
Summary Calendar*

United States Court of Appeals
Fifth Circuit

Feb. 9, 1977

Defendants were convicted in the District Court for the Western District of Texas, John H. Wood, Jr., J., of conspiracy to distribute heroin and they appealed. The Court of Appeals held that evidence was sufficient to show the existence of a conspiracy and defendants' participation therein; that evidence was sufficient to show overt acts in furtherance of the conspiracy; and that fact that the planned sale of heroin was not consummated because of defendants' inability to obtain heroin did not preclude their convictions for conspiracy.

Affirmed.

1. Criminal Law -1144.13(2), 1159.2(8)

In determining whether the Government adequately proved the existence of a conspiracy and defendants' participation therein, court reviews the evidence in the light most favorable to the Government and accepts all reasonable inferences and credibility choices which support the verdict.

2. Conspiracy-47(3)

Testimony by undercover agents concerning conversations between defendants and other co-conspirators which they personally heard and evidence adduced from surveillance operations was sufficient to make prima facie showing of existence of a conspiracy and defendants' participation therein, independent of any hearsay statements by coconspirators.

3. Conspiracy 47(12)

Evidence of telephone conversations and various meetings to discuss and arrange sale of heroin was sufficient to establish overt acts committed

by defendants in connection with conspiracy to distribute heroin. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U. S. C. A. §§841(a)(1), 846.

4. Conspiracy

Success is not an essential element for a conspiracy conviction.

5. Conspiracy 28(3)

Fact that, because of their inability to obtain heroin, defendants were unable to consummate planned sale of heroin did not preclude their conviction for conspiracy to distribute heroin. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U. S. C. A. §§841(a)(1), 846.

6. Conspiracy 47(12)

Even if testimony concerning the fact that two coconspirators other than defendants sold heroin to an undercover agent subsequent to the aborted transaction in which defendants participated did relate to the existence of a second conspiracy

defendants' conviction for the first conspiracy would still stand as theywere proved guilty of participation in one conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U. S. C. A. §§ 841(a)(1), 846.

Appeals from the United States District Court for the Western District of Texas.

Before COLEMAN, GOLDBERG and GEE, Circuit Judges.

PERCURIAM:

Reynaldo Villarreal and Joe Arriaga appeal their convictions for conspiracy to distribute heroin in violation of 21 U. S. C. §841(a)(1) and 846. Villarreal and Arriaga, together with co-indictees Ronald Trevino and Hector Acuna, were accused of conspiring to sell heroin to an undercover Drug Enforcement Administration Agent, Officer Russell Reina. Trevino pleaded guilty, and Acuna died before trial.

Appellants Villarreal and Arriaga, convicted in a joint jury trial, urge identical points of error:

(1) the government failed to establish the existence of a conspiracy with evidence other than hearsay statements of alleged co-conspirators; (2) the government failed to establish appellants' knowing participation in the alleged conspiracy; (3) the government failed to prove the commission of anyovert acts in furtherance of the conspiracy; and (4) the court improperly refused to strike from the indictment several allegations of overt acts and to exclude trial testimony relating to those acts.

[1-5] In determining whether the government adequately proved the existence of a conspiracy and appellants' participation, we view the evidence in the light most favorable to the government, Glasser v United States, 315 U. S., 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), and accept all reasonable inferences and credibility choices which support the jury verdict, United States v Prout, 526 F2d 380 (5 Cir. 1976); United States v Black, 497 F2d 1039 (5 Cir. 1974). In the

instant case, undercover agents Reina and Alonzo had occasion personally to hear and observe appellants and the other co-conspirators. The testimony of these agents about their first-hand observations of the conspirators, as well as evidence adduced from surveillance operations, was sufficient to make a prima facie showing of the existence of a conspiracy and the appellants' willing participation therein independent of any hearsay statements by co-conspirators. The evidence at trial also established numerous overt acts committed by the various conspirators in furtherance of their plan to distribute heroin to Officer Reina, including several telephone conversations and various meetings to discuss and arrange the sale. Because of their inability to obtain heroin the conspirators were unable to consummate the planned transaction. Success, however, is not an essential element for a conspiracy convic-

tion, United States v Jacobs, 451 F2d 530 (5 Cir. 1971), cert. denied, 405 U. S. 955, 92 S. Ct. 1170, 31 L. Ed2d 231 (1972); and the government's proof of conspiracy and appellants' participation was clearly sufficient in the instant case.

[6] Appellants' final point of error challenges the trial court's failure to strike portions of the indictment and testimony at trial relating to the actions of co-conspirators Trevino and Acuna in meeting with Officer Reina and selling heroin to him subsequent to the aborted transaction in which appellants had participated. Although the legal bases of appellants' attack is not clearly specified, they apparently object that these allegations and proofs related to a later, separate conspiracy in which they were not involved. Most likely, the subsequent successful distribution by Trevino and Acuna was simply the consummation of the conspirators' original agreement to sell heroin to Officer Reina.

See United States v Perez, 489 F2d 51 (5 Cir. 1973) cert. denied, 417 U. S. 945, 94 S. Ct. 3067, 41 L. Ed. 2d 664 (1974), for distinctions between single and multiple conspiracies. However, even if the evidence established more than one conspiracy, the law is well settled that appellants' convictions may stand because they were proved guilty of participation in at least one of the conspiracies. United States vs Wayman, 510 F2d1020 (5 Cir.), cert. denied, 423 U. S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975); Robinson v United States, 333 F2d 950 (5 Cir. 1964); Jolley v United States, 232 F2d 83 (5 Cir. 1960).

Finding all of appellants' claims of error without merit, we affirm their convictions.

****

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

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Clerk

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600 Camp Street
New Orleans, La. 70130

March 17, 1977

TO ALL PARTIES LISTED BELOW:

No. 76-2623-USA v. Reynaldo Villarreal, etc.
and Joe Arriaga

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Cicuit Rule 12) the petition ( ) for rehearing en banc has also been denied.*

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W WADSWORTH, CLERK

by /s/ Susan M. Gravois
Deputy Clerk

/smg
cc: Mr. J. G. Hornberger
Mr. Lazaro Garza-Gongora, Jr.
Mr. LeRoy Morgan Jahn
* on behalf of Villarreal